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CASE NUMBER_____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

MARK H. FELDMAN, PRO SE
PETITIONER

VS.

JACKSON MEMORIAL HOSPITAL, ET. AL.
RESPONDENT

ON WRIT OF CERTIOARI TO THE UNITED STATES

COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

What are the requirements for relief from udgment, when the time for appeal has ex- ired before the appellant has notice of the ntryof judgment, where the appellant had erformed with due diligence, on multiple ccasions to learn when judgment would be ntered.

Is an appellant entitled to relief from udgment under Rule 60 (b)(1) and/or 60(b) 6) of the federal rules of civil procedure here appellant made multiple attempts by isit to ascertain from the District Court hen the Final Judgment would be entered so hat he could appeal, where the entire docket heet was lost from the clerk's office, and here appellant learns of entry of the Final udgment 48 hours prior to the hearing for elief from judgment and finds the Final udgment less than 24 hours prior to the earing.

Does the standard for relief in the Fifth ircuit outlined in Wilson v. Atwood Group,

725 F. 2d 255 and the standard in the Eleventh Circuit adopted as binding precedent from the Fifth Circuit, Bonner, v. City of Prichard, 661 F. 2d 1206 (11 th Circ. 1981) compared to the standard relief in the Ninth Circuit adopted in Rogers v. Watt, 722 F. 2d 456 (1983) and the District of Columbia Circuit applied in Expeditions Unlimited Aquatic Ent. Inc. v. Smithsonian Institute, 500 F. 2d 808 (1974), effectively create by a conflict in the Circuits violation of the Due Process and Equal Protection lauses of the Fourteenth Amendment?

4. Did the judgment of the Eleventh Circuit Court of Appeals conflict with the applicable decisions of this Court for relief under the "unique circumstances" exception to the requirement of timely appeal in Thompson v. Immigration and Naturalization Service, 375 U. S. 384, 84 S. Ct. 397, 11 L.Ed.2d 404 (1964), Harris Truck Lines, Inc., v. Cherry Meat Packers, Inc., 371 U. S. 215, and Klapprott v. United States, 315 U. S. 601,

69 S. Ct. 384, 93 L. Ed. 266 (1949)?

5. Is it a"mistake" under Federal Rule Civ. Proc. (60)(b)(1) for a District Court not to apply in intervening appellate decision, which is contrary to the District Courts interpretation of the law, when a party seeks relief under the Rule ?

PARTIES

I HEREBY CERTIFY that the following persons and/or entities are interested in the outcome of this case:

The Eleventh Circuit Court of Appeals

The Honorable James W. Kehoe (Trial Judge), District Court for the Southern District of Florida

Dr. Mark H. Feldman, Appellant'(Plaintiff), (Petitioner)

The following are the Appellee's (defendants), (Respondent)

Jackson Memorial Hospital
Board of Trustees of the Public Health Trust of Dade County, Fla.
Memorial Hospital of Hollywood
South Broward Hospital District, Broward County, Fla.
Broward General Medical Center
North Broward Hospital
Imperial Point Hospital
The North Broward Hospital District
Cedars of Lebanon Hospital
Mt. Sinai Medical Center
Florida Medical Center Hospital
Bennett Community Hospital
Holy Cross Hospital
North Beach Medical Center
Pembroke Pines General Hospital
Doctors General Hospital
International Hospital
North Miami General Hospital
Cypress Community Hospital
North Ridge General Hospital

PARTIES (CONT'D)

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Melvin Drucker
William Cleveland
Robert Zeppa
William McCollough
Augusto Sarmiento
Wallace Miller
Harry Beller
Alan Cohen
Michael Gurvey
Marshall Hall
Mario Stone
Salvadore Ramirez
Claud Holmes
Bronson McNierney
Arthur Pearl
Samuel Turek
William Terhevden
Harvey Grable
Ledford Gregory
William Cullipher
Thomas Samartino
Salvadore Ramirez
Paul Baxt
Robert Berger
George Crane
Harry Fisher
Robert Niles
Alfonso Petti
Larry Rosenbaum
Sidney Cole
Rufus Broadaway
Alan Cohen
Harold Glick
Marshall Hall
Eugene Komrad
Sheldon Marne
Lester Russin
Alvin Tobis
Edward Rockwood
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Niles LeStrange
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CASE NUMBER_____

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VS.

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ON WRIT OF CERTIORI TO THE UNITED STATES OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mark H. Feldman, Pro Se
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MARK H. FELDMAN, Pro Se, respectfully petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on January 11, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is in this petition at Appendix F V. The opinion of the District Court which are unreported are in this petition at Appendix A, C and D and the reported decisions at 509 F. Supp. 815 and 571 F. Supp. 1000.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1985. This Court has jurisdiction to review the decision of the Court of Appeals by Writ of Certiori pursuant to 28 U. S. C. S 1254 (1).

STATEMENT OF THE CASE

Plaintiff/Appellant/Petitioner filed his Complaint in the District Court, pro se, on February 9, 1979 alleging violations of the Sherman and Clayton Acts, the United States and Florida Constitution and multiple Florida State Law Claims. The complaint was dismissed without prejudice on March 21, 1980. (docket n.292) Plaintiff's Amended Compalint was accepted by Order May 14, 1980. (docket n.298) Defendants motion to Dismiss the Amended Complaint was denied in part and granted in part. Feldman v. Jackson Memorial,et al,509 Fed supp 815. Defendants were given 30 days from November 11,1981 to answer the Amended Complaint. (R.1) Defendants did not answer the amended complaint and plaintiff moved for default, (R.7), which was entered on January 7, 1982.(R.7) Defendants moved to have the default set aside (R.8,9,10,11,12) which was opposed by plaintiff. (R.13-25) The Court set the default aside. (R.26,27)

Jury trial began on June 13, 1983 and continued for five weeks. On July 14, 1983, after close of the plaintiff's case, the Court granted the defendants Motion for a Directed verdict, (Docket Sheet no. 849) and the Court announced it's decision.(R.28) The Court filed its Memorandum and Order,(R.29-47), Feldman v. Jackson Memorial Hospital, et.al.,571 Fed Supp 1000 and the Final Judgment on Sept. 19, 1983, (R.48-49). Defendants filed their costs bill and motions. (R.50-52,53-54,55)

R. Original record on appeal.
T. Transcript of hearing on plaintiff's Motion to vacate and Reenter the final judgment of December 2, 1983.

Docket n., hereinafter D., docket sheet, number from the docket sheet in original record on appeal.

From the time the Court announced its decision in this case on July 18, 1983 until the filing of the final judgment on Sept. 19, 1983, plaintiff attempted to learn from the Clerk and the Court through its secretary, when the final judgment would be entered. These attempts were made by visits to Judge Kehoe's Chambers, the Court Clerk's office, the record room in the

clerk's office. At such times, the docket sheet was missing and the Court file in disarray. (Presumably because the clerk's office and files were moved from the old federal courthouse building into the new federal courthouse). (T.4-6,8-12,14-18)

Plaintiff was in the clerk's office to view the record, seeking the final order on Oct.13, 1983, 6 days prior to the time for appeal would expire. (R.119, T.5)

Within 24 hours after learning from the opposing counsel that the final judgment in this case had been entered on Sept. 19, 1983, plaintiff filed his Motion for an Emergency Hearing and his Motion to Vacate and Reenter the Final Judgment so that plaintiff could timely appeal. (R.56-57, 58-59, T.13,14) Plaintiff based his application for relief on the fact that he had not received the Final Judgment entered by the Court and on several occasions after the trial had attempted to find out when the Final Judgment would be entered so that he could appeal. (R.57, T.4,5,6-11,13-14,17-19

On Dec. 1, 1983, Dr. Feldman(plaintiff) told Mr. Minnix, clerk to Judge Kehoe, he(plaintiff) had found the Final Judgment, and filed his affidavit to that effect. (R. 118, T. 2)

The Court also noted the missing docket sheet.(T.11,16,17,27) and now uses the docket sheet as constructed by the Judge's clerk as the official record. (T. 27).

Defendant's sole basis for relief from the default entered on January 7, 1982(R.7) was FRCP (60) (b) (1), at 3,.Noaffidavits were filed nor any evidence offered to establish that none of the more than 30 lawyers in the same case received the Order of November 3, 1981 (R.1) (T.6,7, Docket Sheet no. 341)despite the docket sheet mailing notation " CCAP" meaning conformed copies to all parties. (T.7). Defendnats did not follow the docket sheet for the Court's Orders, (R.13-25,@ 2.,3)

Plaintiff sought modification of the Order taxing costs. (R.89) on the issue of the amount allowed for transcript costs.

Plaintiff's motions for relief under FRCP 60(b)(1)(6) and costs judgment were denied (R. 120-128, 130-132) and an appeal to the Eleventh Circuit Court of Appeals ensued (R.129,133) Appendix D

Appellant sought an initial hearing En Banc in the Court of Appeals which was denied, Appendix E

The Court of Appeals entered its unpublished opinion Jan.11,1985. Appendix F and petitioner now appeals by Writ of Certiorari. Contrary to the assertion by the Court of Appeals that "the District Court directed verdicts in favor of all defendants on every legal theory alleged by Feldman"...(emphasis supplied),(App.2f) the District Court dismissed all claims but the Sherman Act allegations and allowed only those at trial. Feldman, supra, 509 F.Supp. 815, 571 F.Supp. 1000 (1983).

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ. First, the decision below conflicts with this Courts' ruling in KLAPROTT, HARRIS AND THOMPSON. These cases made clear relief under Fed Rule Proc 60(b)(1)(6) may be had for circumstances applicable to petitioners case. The key to relief lies in appellants "due diligence" behavior. Petitioner meets the test in all the circuits. The District Court and the Court of Appeals adopted a contrary standard.

Second, the decision of the Eleventh Circuit Court of Appeals adopted by binding precedent of the Fifth Circuit, makes a clear conflict between the Ninth and District of Columbia Circuit and the Fifth and Eleventh Circuits. This conflict gives appellants in the Ninth and District Court Circuits greater access to the appeals courts on the same set of facts as opposed to the latter two circuits. Such an unequal standard of review

y appellate courts deprives appellants in the tates affected of their rights of access to he courts under the Due Process and Equal rotection Clauses of the Constitution.

Third, this Court has not decided hether failure by a District Court, to pply an intervening appellate decision ontrary to the District Courts' interpretation of the law is a "mistake" for purposes of elief under Fed. Rule Civ. Proc. 60(b)(1).

The "mistake" issue was presented to he District Court in plaintiffs brief and to he Eleventh Circuit Court of Appeals in ppellaants brief. Neither Court addressed he issue.

For these reasons the Writ of Certiorari hould be granted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURTS RULINGS IN THOMPSON, HARRIS AND KLAPRATT.

Petitioner realizes here as he did in the District and Appellate Courts that it is his burden of showing that absent such relief, as FRCP (60) (b)(6) provides, an "extreme" and "unexpected"hardship will result. Griffin, supra, quoting United States v. Swift & Co., 286 U. S. 106, 119, 52 S. Ct. 460, 464, 76 L. Ed. 999 (1932). There can be no greater extreme and unexpected hardship to the plaintiff than an end to the antitrust case he began more than 5 years ago only to be deprived of an opportunity to appeal an adverse decision taking the case from the jury after 5 weeks of trial. If Klapprott v. United States, 335 U. S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266(1949) remains viable to "accomplish"justice", Griffen v. Swim-Tech Corp., 722 F. 2d 677 (1984) at 680, then this case should be resolved in favor of plaintiff by reversal of the District

and Appeals Courts and allowing Plaintiff to appeal by vacating and reentering final judgment, that "justice be done in light of all the facts", Griffin supra, at 680, quoting Bankers Mortgage Co. v. United States, 434 F. 2d 73, 77, (5thCir., cert. denied, 399 U. S. 927, 90 S. Ct. 2242, 26 L. Ed. 793 (1970) (emphasis in original). This Courts' subsequent decisions Harris and Thompson made clear that the rule was to be interpreted broadly to "accomplish justice." Petitioner falls squarely within the framework of those decisions by his diligent efforts in the prosecution of his case. The Fifth and Eleventh Circuits have adapted a contrary overly restrictive standard opposite to this Courts rulings. Additionally this Courts rulings seem to make clear that on close calls the balancing tests should fall on the side of the petitioners that their right of appeal should not be curtailed by decisions that are contrary to the standards authorized by this Court.

Plaintiff does not deny the Court's Final Judgment was received, although it was in an alternate form, in that it was not together as one document as described by the Court. (T.20) The question becomes whether the plaintiff's actions following the Directed Verdict from July 18, 1983, the date the decision was announced, and October 19, 1983, the date the 30 day time period for plaintiff to file his notice of appeal would expire, and 30 days later, the date the extended time period to appeal expired, constituted sufficient due diligence and/or the requirements for relief under FRCP 60(b)(1)(6). THE EMERGING DUE DILIGENCE STANDARD FOR FILING DELAYED NOTICE OF APPEAL IN FEDERAL COURTS, Calkins, Williamette Law Review, Vol. 19:609 (1983).

The Fifth Circuit, in February of 1984, in an En Banc, decision reviewed the relief under FRCP 60(b) and 77(d) issue in Wilson v. Atwood Group, 725 F.2d 255. By the law of the Fifth Circuit, had plaintiff appeared before

the District Court relying on non-receipt of the Final Judgment, there would be no relief. In this case, plaintiff acted as though there had been no receipt and with all the due diligence now required by the case law. Wilson, supra at 257,258, " But to be relieved from the effect of a judgment, a party must show more than mere reliance on the clerk to give notice of a judgment." Plaintiff more than satisfies the requirements for relief in Judge Clark's dissent in Wilson. The something more was outlined heretofore by plaintiff's actions. Had the District Court allowed plaintiff to ask it's Clerk if judgment had been entered or when it would be forthcoming, plaintiff would not now be before this Court on this issue, but would be on the issues he wishes to bring to the Court persuant to Judge Kehoe's rulings in 509 Fed. Supp. 815 and those in 571 Fed. Supp. 1000. And here, there was no docket sheet to check.

Pro Se litigants and lawyers walk a fine line on how often and to what extent the Court can be contacted when waiting for a Ruling or Judgment. No one wishes to invoke the Court's ire by repeated contacts. Indeed, too many contacts by too many lawyers would prove a burden as well. For the above reasons the Writ should be granted.

II

THE DECISION BELOW DIRECTLY CONFLICTS WITH THE NINTH CIRCUITS RODGERS DECISION AND THE DISTRICT OF COLUMBIA'S EXPEDITIONS DECISION.

The Ninth Circuit considered the FRCP 60 (b) in Rodgers v. Watt, 722 F. 2d 456 (1983). Relief was given where the entries on the docket sheet were entered by the clerk out of dated order. Rodgers, supra at (7), 461. This has happened in this case, and in addition, an Order from the District Court was left off the District Court docket sheet and brought to this Court's attention by appellant.

(R. docket sheet numbers 847, 866, 867, 868,869, 870, 871, 872, 973, 876) (District Coutr item no. 876 not docketed until 2/2/84 after district court clerk notified by plaintiff that the Order was not entered on the docket sheet) Plaintiff's actual notice of the entry of the final judgmentwas not until a chance talk (emphasis supplied) with defendents counsel on November 28, 1983. (t.13.) Under Rodgers,supra he is entitled to relief. Rodgers,supra, grants relief when other Circuits would not under the same set of facts. The standard for relief in the District Court Circuit under Expeditions Unlimited Aquatic Enterprises, Inc.,v. Smithsonian Institute, 500 F. 2d 808, is almost as lenient as the Ninth Circuit. In contrast the overly strict requirements set forth in the Fifth Circuit by Wilson and now the Eleventh Circuit make access to an appeals court directly related to which Circuit in which a litigant resides. Such an unequal access to the courts violates the Fourteenth Amendment Due Process and

equal protection clause.

In the Court's Order Denying Plaintiff's Motion to Vacate and Reenter Final Judgment, (R. 120-128), at 125(8), the Court considers the prejudice defendants will endure if plaintiff's motion is granted. Surely, the plaintiff's rights are equally prejudiced if he is not permitted an appeal after four years of litigation. Now there can be no doubt that in such a case as this, a loss by either side would be appealed. There can be no prejudice in an appeal taking place less than 45 days more than it otherwise would have been."The issues were complex, some of them quite novel." (R. 121 @ 2.) Such novel issues should not be lost by such an inadvertance as the facts in this case show.

Defendants moved to set aside their default and in support sought relief under FRCP 60 (b)(1). (R.8). In their pleading they offered no affidavits nor other evidence in support of their contention that they did not

receive the Court's Order giving them 30 days to answer plaintiff's amended complaint. (R.1). Defendants rested their prayer for relief solely on the issue that the Order was not received and probably not mailed despite the clerk's notation to the contrary on the docket sheet. (Docket n.341.)

In defendant's briefs in opposition to the granting of relief to plaintiff under FRCP 60(b)(1)(6), they spend a total of almost 27 pages on the point that lack of notification of Court Orders or lack of receipt is no grounds for relief under the rule. Indeed, had the Court not granted Defendnat's relief, they surely would have appealed, and if their position which they now wish applied to plaintiff, were applied to them, relief under the rule could not be had. (R. 90-100, 101-117). Nonetheless, 60(b)(1) relief was granted them by the District Court

Petitioner meets 2of the 3 standards in Expeditions, supra at 808,, 1) winning party not prejudiced and 2) losing party moving to

vacate judgment after learning of entry.

and 3 of the 4 elements in Rodgers, supra at 460, 1) lack of prejudice, 2) prompt filing and 3) due diligent and reason.

Viewing all the facts in their entirety in this case and the principals of this Court the Writ should be granted.

III

FAILURE TO APPLY AN INTERVENING APPELLATE COURT DECISION IS A "MISTAKE" JUSTIFYING RELIEF UNDER FED. RULE CIV. PROC.60 (b)(1).

This Court has not decided the issue of under what facts a party may obtain relief under the "mistake" wording of FRCP 60(b)(1). Does an intervening Appellate Court decision not applied to the case before the Court when the decision was made constitute a "mistake"?

"There is authority for the view that the word " "mistake"" as used in Rule 60(b)

(1) encompasses any type of mistake or error on the part of the Court, including judicial mistake as to applicable law. "Barrier v. Beaver, 712 F. 2d 231 (1983) at 234. Schildhaus v. Moe, 335 F. 2d 529 (2d Cir. 1964) failure to apply intervening appellate decisions contrary to district court interpretation of the law is a "mistake"). Plaintiff brought to the district court the 7th Circuit's decision in Wilk v. American Medical Assn, et.al., 635 F. 2d 1295, 719 F. 2 d 207,after palintiff's trial on Sept. 19, 1983, (R.87), and, Weiss v. York Hospital, Inc., 745 F. 2d 786 which was decided prior to the Eleventh Circuits opinion in appellants appeal.

Because the question has not been decided by this Court the Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

May 1, 1985

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 79-758-Civ-JWK

MARK H. FELDMAN, Pro Se,

Plaintiff,

vs.

ANNOUNCEMENT OF DECISION

JACKSON MEMORIAL HOSPITAL, etc., et.al.,

Defendants

At the conclusion of the presentation of the Plaintiff's cast-in-chief, all defendants filed motions for directed verdict. At the conclusion of argument on the arguments, the Court announced that it would grant the motions and enter a directed verdict in favor of all defendants. A final appealable order will be issued separately at a later date. This memorandum order will relate the rationale upon which the Court based its decision.

DONE AND ORDERED in chambers at Miami, Florida, this 18 day of July, 1983.

JAMES W. KEHOE
UNITED STATES DISTRICT
JUDGE

C: Mark H. Feldman,
pro se
All Counsel of Record

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-758-Civ JWK

MARK H. FELDMAN, Pro Se

Plaintiff,

vs.

JACKSON MEMORIAL HOSPITAL, et. al.,
Defendants

MEMORANDUM DECISION AND ORDER GRANTING MOTIONS FOR DIRECTED VERDICT

INTRODUCTION

This is a suit brought and prosecuted by a podiatrist pro se against 17 hospitals and 49 doctors for alleged violations of S S 1 and 2 of the Sherman Act, 15 U. S. C. S S 1 and 2.Plaintiff's Amended Complaint initially alleged federal claims under the antitrust and civil rights law. All but the Sherman Act claims were disposed of previously in Feldman v. Jackson Memorial Hospital, 509 F. Supp. 815 (S. D. Fla. 1981) 1

The antitrust claims proceeded to trial before a jury. In what was, in effect, a bifurcated trial,[2] plaintiff presented

nearly five weeks of testimony on liability, after which all defendants moved for a directed verdict. The sole question presented by defendants' motions is whether, considering all of the evidence in the light most favorable to plaintiff, there was evidence of such quality and weight that reasonable people could reach different concludions on the liability issues. The Court is satisfied that plaintiff failed to meet this standard, and accordingly the motions for directed verdict must be granted.[3]

SUMMARY OF FACTS

Plaintiff, Mark H. Feldman, D. P. M., (" Dr. Feldman ") filed suit in 1979 alleging a combination or conspiracy in restraint of trade in the hospital/health care industry in violation of S 1 of the Sherman Act, and monopoly violations proscribed by S 2 of that Act. The 17 defendant hospitals are all located in Dade and Broward Counties, Florida. Five of the hospitals are public and 12 are private.[4] Dr. Feldman also named the adminis-

trators of those hospitals in his suit[5] and 49 doctors, most of whom are orthopedic surgeons. The gist of Dr. Feldman's case is his claim that all defendants acting in concert (1) conspired to prevent him from competing in the medical market-place, and attempted to monopolize the health care industry by arbitrarily rejecting his application to practice podiatry[6] as a medical staff member of the defendant hospitals, and (2) conspired to ruin his podiatry practice and run him out of business. After nearly five weeks of testimony, during which more than 80 witnesses testified, the evidence showed neither.[7]

To withstand defendants' motions on the S 1 claim, Dr. Feldman's bueden was to produce substantial evidence (1) that a conspiracy existed among the defendants in which they came to a " meeting of the minds" to undertake an illegal anticompetitive act; (2) that the conduct had the effect of injuring competition in the marketplace; and

(3) that plaintiff suffered some economic injury caused by the illegal acts of defendants. Similarly, on the S 2 claim, Dr. Feldman's burden was to show by substantial evidence that one or more of the defendants had monopolized, attempted to monopolize, or conspired to monopolize some relevant product and geographic market. It is considered judgement of the Court that Plaintiff failed to adduce sufficient evidence to permit the jury to consider these issues.

11

DISCUSSION

A. STANDARD FOR DIRECTED VERDICT MOTIONS.

The standard for a directed verdict motion is set forth in Boeing Company v. Shipman, 411 E. 2d 365, 373-77 (5th Cir. 1969, and Warren v. Ford Motor Credit Company, 693 F. 2d 1373, 174-5 (11th Cir. 1982). The test is whether there is substantial evidence to support plaintiff's claims. Substantial

evidence is " evidence of such quality and weight that reasonable and fair-minded men in the exercise of partial judgment might reach different conclusions... and (therefore) the case (should be) submitted to the jury. A mere scintilla of evidence is sufficient to present a question for the jury." Boeing Company v. Shipman, supra at 374. Directed verdicts in antitrust cases are goverened by the same standard as other cases. Continental Ore Company v. Union Carbide and Carbon Corporation, 370 U. S. 690, 82 S. Ct. 1404 (1962)

In applying this standard, the Court looks not only to the facts that have been adduced but as well to any reasonable inferences which can be drawn from those facts. However,

> (an) inference is legitimate only when the evidence offered makes the existence of the fact to be inferred more probable than the non-existence of the fact, and...any lesser test would permit the jury to rest its verdict on speculation and conjecture. 9 Wright & Miller, Federal

Practice S 2528 at 565 (1971)

Conspiracy allegations may be proved by introducing circumstantial evidence but such evidence should be viewed with caution.

> Where circumstantial evidence is relied upon to establish the conspiracy or any other essential facts, it is not only necessary that all circumstances show the existence of the conspiracy and facts sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. Weit v. Continental Illinois Nat"l Bank & Trust, 641 F. 2d 457, 463 (7th Cir. 1981), cert. denied, ___ U. S. ___, 102 S. Ct. 1610 (1982) (quoting from Pevely Dairy Co. v. United States, 178 F. 2d 363, 367 (8th Cir. 1949)

In this case Dr. Feldman took almost five weeks to present his case on the liability phase alone. Aware of the fact that a conspiracy case is difficult to prove, the court gave Dr. Feldman a great deal of latitude in presenting his evidence.[8] When Dr. Feldman rested, it was clear that he had fallen short of producing the substantial evidence required to

send this case to the jury against any of the defendants on his antitrust claims.

B. FELDMAN'S CASE UNDER THE SHERMAN ACT.

1. The Interstate Commerce Connection

Although the jurisdictional showing that a plaintiff must make was relaxed by MdLain v. Real Estate Board of New Orleans, Inc., 444 U. S. 232, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980) a plaintiff must still prove " either that the business activities occurred in commerce or that those activities had an effect on commerce." Construction Aggregate Transport v. Florida Rock Industries, 710 F. 2d. 752, 766 (11th Cir. 1983); Accord, Hospital Building Co. v. Trustees of the Rex Hospital, 425 U. S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976).

Dr. Feldman alleged in his Amended Complaint that defendants' activities had a substantial impact on interstate commerce. This court previously held that his allegations were sufficient, if proven, to invoke the Sherman Act. Feldman v. Jackson Memorial

Hospital, 509 F. Supp. 815, 820 (S. D. Fla. 1981).[9] In order to prove those allegations, this Court held in Feldman, supra at 820, that it was the defendants' " activity of providing medical care to patients...that must be connected with interstate commerce in order to sustain jurisdiction."[10]

Dr. Feldman's only proff on jurisdiction was meager and consisted of reading three or four answers to requests for admissions sent to each defendant. These admissions established no more than that some of the defendants obtained some supplies from out-of-state, treated some out-of-state patients, and received some out-of-state funds from insurance companies and Medicare. Dr. Feldman made no serious attempt to quantify any of these items or relate them in any meaningful manner to defendants' activities invilved in podiatric surgery.

While the proof adduced at trial to support antitrust jurisdiction was marginal at best, the Court believes that Dr. Feldman's

amended complaint should not be dismissed for lack of jurisdiction. Since the Court's decision did not rest on jurisdictional grounds, there are several other issues that must be examined to explain the directed verdict against Dr. Feldman.

2. Plaintiff's Section 1 Claim.

(a) The evidence failed to prove a conspiracy

The substance of Dr. Feldman's claim under S 1 of the Sherman Act is that the defendants combined or conspired to prevent him from obtaining hospital privileges so that he was unable to do certain types of podiatric surgery which required operating room facilities. Dr. Feldman maintained that orthopedic surgeons are his competitors. Therefore, his reasoning goes, the defendant-orthopedic surgeons conspired among themselves and with the defendant hospitals to preclude him from practicing at those hospitals so that the orthopedic surgeons could obtain these surgical cases for themselves.

While Dr. Feldman'a proff that a conspiracy existed was questionable in its entirety, specifically he failed to establish that the defendant-orthopedic surgeons were his competitors in any meaningful case. The defendant-orthopedic surgeons who testified estimated that only one to five percent of their respective practices was devoted to the ankle or below,[11] with some of them specializing to the extent that they performed no foot or ankle surgery whatsoever. Many of the key defendant orthopedic surgeons had no private practice.[12]

The Court previously held that a rule of reason analysis would apply in this case.[13] Dr. Feldman therefore had to establish not only that the defendants restrained trade but that their restraint was unreasonable. Additionally, the plaintiff in a rule of reason case must show that defendant's conduct had an impact upon competition in his particular business or profession, and not just upon plaintiff's business. "The true test of

egality is whether the restraint imposed
such as merely regulates and perhaps
ereby promotes competition or whether it
such as may suppress or even destroy
mpetition." Board of Trade of City of
icago v. United States, 246 U. S. 231, 238,
S. Ct. 242, 244 (1917). See also
tional Society of Professional Engineers v.
ited States, 435 U. S. 688, 691,98 S. Ct.
55, 1365, 55 L.Ed. 2d 637 (1978).

A conspiracy under S 1 is essentially
a unity of purpose or a common design and
derstanding or a meeting of the minds in an
lawful arrangement...." American Tobacco
mpany Co. v. United States, 328 U. S. 781,
0, 66 S. Ct. 1125,1139 (1946). Dr. Feldman
oduced no direct evidence of a conspiracy,
d relied solely upon circumstantial evidence
prove his case. The only evidence he offered,
wever, was that some defendants saw each
her at meetings and in the hospitals and
erefore may have had an opportunity to
nspire. Even if true, a conspiracy will not

be inferred from proof of an opportunity to conspire. Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457, 462 (7th Cir. 1981), cert. denied, 454 U. S. 810 (1982).

Dr. Feldman also attempted to show a conspiracy through parallel behavior. The fact of parallel behavior, standing alone, unequivocally does not prove the existence of a conspiracy.[14] The evidence showed that the defendant hospitals, over a period of almost ten years, responded independently and differently to his requests for medical staff membership. Some hospitals granted him limited staff privileges which he found unacceptable; some refused to consider his application because there was no provision for podiatrists in their by-laws; some refused to process his application because he could not show proof of malpractice insurance required of all staff members; and some denied him provileges because podiatry was to them little known and ill-defined practice under

community and generally accepted hospital accreditation standards. No credible evidence was presented to show that the hospitals' actions were interrelated or that their reasons were pretextual.

Dr. Feldman spent a great deal of time presenting testimony from defendant orthopedic surgeons and hospital administrators only to have them deny hi- allegations of conspiracy. Quite obviously, these denials of a conspiracy do not rise to the level of proof of conspiracy. Indeed, the undeniable fact that many defendants refused to grant hospital staff privileges to plaintiff is not enough to prove a conspiracy. There was no evidence to show that any redusals were the result of an illegal agreement. The existence of an agreement being essential to a conspiracy, unilateral action alone does not violate the federal antitrust laws. See Solomon v. Houston Corrugated Box Company, 526 F. 2d. 389 (5th Cir. 1976). Dr. Feldman's general accusations simply do not create an actual contest of the

denials by the defendants. Id.

Moreover, the evidence indicated that the doctor defendants were acting in their respective roles as members of their medical staff, not in furtherance of their own practices, when they evaluated plaintiff's application. Dr. Feldman therefore failed to prove that the defendant doctors were acting for any " personal stake" when they denied his application for medical staff privileges.

(b) The evidence failed to market impact.

Even if Dr. Feldman proved that a conspiracy existed among the defendants, he failed to explain what anticompetitive effect this conspiracy had on the local medical marketplace. It is axiomatic that a conspiracy which has no effect on trade is not prohibited by the Sherman Act.

The plaintiff in a rule of reason case must not only show that he has been injured, but that there was an antitrust injury as well. Brusnwick Corp. v. Pueblo Bowl-O-

Mat, Inc., 429 U. S. 477, 489, 97 S. Ct. 690, 697 (1977). This is an " injury of the type the antitrust laws were intended to prevent and that flows from that which makes dedendants' acts unlawful." Id. The anti-trust laws exist to protect competition and not for the protection of any given competitor. Brown Shoe Company v. United States, 370 U. S. 294, 320, 82 S. Ct. 1502, 1521 (1962). "Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case." Kaplan v. Burroughs Corp., 611 F. 2d. 286, 291 (11th Cir. 1979).

Dr. Feldman presented no evidence of economic impact on anyone. He also presented no factual testimony from which the economic impact of his alleged conspiracy could be evaluated. Dr. Feldman simply failed to prove any adverse impact on competition or prejudice to the public interest. He has therefore failed to prove another essential element of his rule of reason case and was not

entitled to jury consideration of his anti-trust claim.

(c) No "fact of damage."

In addition to proving a violation of the antitrust laws, a private antitrust plaintiff must show injury to his business or property which is causally related to the violation. 15 U. S. C. S 15; Cooper Liquor, Inc. v. Adolph Coors Company, 624 F. 2d 575 (5th Cir. 1980); Kypta v. McDonald's Corp., 671 F. 2d 1282 (11th Cir. 1982). This " fact of damage " must be shown with some reasonable degree of certainty. When the trial is bifurcated, the fact of damage or impact must be shown in the first phase in order for the plaintiff to prevail on an essential element of his cause of action.

Dr. Feldman alleged that as a result of defendants' antitrust violations he was precluded from practicing his profession. By contrast, his proff showed that he actually had privileges at several hospitals. He had a successful podiatric practice near University

Community Hospital (a non-defendant Hospital) in West Broward County which he gave up in 1977 when he moved his practice to Dade County. Dr. Feldman obtained and still has privileges at Parkway General Hospital (a non-defendant) and at Bennett Community Hospital (a defendant hospital).

3. Plaintiff's Section 2 Claims.

Dr. Feldman accused defendants of all three offenses covered by S 2 of the Sherman Act; monopolization, attempt to monopolize, and conspiracy to monopolize. The general elements required to prove each of these violations are well-settled.

In order to prove actual monopolization, a plaintiff must show that defendant possesses monopoly power in the relevant market and that such power was willfully acquired or maintained, and not merely acquired as a result of superior products, business acumen, or historical accident. United States v. Grinnell Corp., 384 U. S. 563, 86 S. Ct. 1698 (1966). "Monopoly power" is the power to control prices or exclude competition.

nited States v. E. I. du Pont de Nemours &
ompany, 351 U. S. 377, 76 S. Ct. 994 (1956)
he defendant must possess a very large share
f the defined relevant market in order for
n actual monopoly to exist. United States v.
. I. du Pont Nemours & Company, supra. The
elevant product market includes those
roducts which are reasonable substitutes for
ach other. The relevant geographic market
s that area in which the defendant effect-
vely competes with other businesses for
istribution of the relevant product. Morton
uildings of Nebraska, Inc. v. Morton
uildings, Inc., 531 F. 2d 910 (8th Cir. 1976).
The relevant market establishes the backdrop
gainst which to measure economic power. It
ecessarily follows that 'defining the product
n geographical markets is a threshold require-
ent under S 2'." In re Municipal Bond
eporting Antitrust Litigation, 672 F 2d 433,
41 (5th Cir. 1982) (quoting Spectrofuge
orp. v. Beckman Instruments 575 F.2d 256, 276
5th Cir. 1978).

Dr. Feldman made no serious attempt t trial to define either the relevant product r geographic market.[15] Although the Amended omplaint alleged that Dade and Broward Counties ere the relevant geographic markets, the vidence showed that most physicians practiced ctively at only two or three hospitals as a eneral rule because they must be able to get o the hospital quickly. Dr. Feldman defined he relevant product market in his pleadings s the rendition of surgical services, generally. his is too broad a construction of the term since r. Feldman was only licensed to perform procedures elow the knee. He produced no evidence of the nterrelationship between services performed n the foot and leg by orthopedic surgeons, odiatrists, or others such as general surgeons r even general family practitioners. Without this type of economic analysis of the elevant product and geographic markets, Dr. eldman's monopoly claim could not be submitted o the jury.

Even assuming that Dr. Feldman could

ne the relevant product market as surgical
ices below the knee and the relevant
raphical market as Dade and Broward
ties, he produced no evidence that any
ndant had monopoly power in these markets.
ne contrary, Dr. Feldman's evidence
ed that there were many defendant orthopedic
eons practicing in this area and many
r orthopedic surgeons and podiatrists who
not parties to this action. Dr. Feldman's
nt that the defendants collectively enjoyed
poly power must be rejected for two reasons;
t, he produced no evidence that defendants,
as a group, possessed a large enough share of
ever the relevant market is to qualify for a
poly; second, a shared monopoly, even if proven,
d not necessarily violate S 2.
olidated Terminal Systems v. I. T. T. World
unications, 535 F. Supp. 225 (S. D. N. Y.
). Since Dr. Feldman failed to prove that
defendant enjoys monopoly power in a
vant product market, or that any defendant
the specific intent and the dangerous
ability of success for monopolizing a

relevant product market, there was nothing for the jury to consider under S 2 of the Sherman Act. Id.

Dr. Feldman likewise failed to establish a case for an attempted monopoly against any defendant. As in the case of actual monopoly, a plaintiff claiming an attempt to monopolize must also prove the relevant product and geographic markets. Morton Buildings, Inc., supra. To prove attempted monopolization, the plaintiff must also show that the defendant had a specific intent to monopolize and that there was a dangerous probability that the attempt would succeed. Dimmitt Agri Industries, Inc. v. C. P. C. International, Inc., 679 F. 2d 516 (5th Cir. 1982), cert. denied ___ U. S. ___, 103 S. Ct. 1770 (1983); Spectrofuge Corporation v. Beckman Instruments, supra. Generally speaking, a defendant must have a significant market share--probably at least 20% of the relevant market--before a dangerous probability of achieving actual

onopoly could be found. Dimmitt Agri
ndustries, Inc., supra, 679 F.2d at 532-533.
n this case, Dr. Feldman's evidence fell
hort of proving either a dangerous prob-
bility of success or a specific intent to
onopolize.

The third offense prohibited by
2 is a conspiracy to monopolize. Although
he burden on this claim does not require
roof of clearly defined relevant markets,
s with an actual monopoly or attempt to
onopolize claim, it is required that a
inimal showing...be made as to the product
nd geographic context of the alleged con-
piracy." Alexander v. National Farmers
rganization, 687 F. 2d 1173, 1193 (8th Cir.
982).

In a conspiracy to monopolize case,
he plaintiff must prove (1) an agreement or
nderstanding between two or more economic
ntities, (2) a specific intent to monopolize,
nd (3) overt acts in furtherance of the alleged
onspiracy. Robinson v. MaGovern, 521 F. Supp.
42, 892 (W. D. Pa. 1981). "In other words,

conspiracy to monopolize essentially applies the law of criminal conspiracy to the monopolization context." Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd., 513 F. Supp. 1100, 1319 (E. D. Pa. 1981); L. Sullivan, Handbook of the Law of Antitrust S 49 (1977).

As the Court has already discussed in the context of Dr. Feldman's S 1 claim, there was insufficient evidence of any conspiracy. Therefore, there can be no adequate evidence of a conspiracy to monopolize to present this issue for the jury's consideration. Further, Dr. Feldman failed to produce any evidence of a specific intent to monopolize.

4. State Action Immunity.

The defendant-public hospitals have raised the state action examption of Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307 (1942). Recent Supreme Court cases have greatly limited the applicability of this defense. See, Community Communications Co., Inc. v. City of Boulder, 455 U. S. 40, 102 S. Ct. 835 (1982);

California Retail Dealers Ass'n v. Midcal Aluminum, Inc., 445 U. S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), and City of Lafayette v. Louisiana Power & Light Co., 435 U. S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978). Because of Dr. Feldman's lack of proof on several essential elements of his claims, it is unnecessary for the Court to discuss the applicability of this evolving doctrine and the sensitive federalism issues involved. Even assuming the public hospitals were private parties, Dr. Feldman has failed to prove his case against them. It is , therefore unnecessary to resolve this additional defense raised by the public hospitals

CONCLUSION

Dr. Feldman's failure of proof requires that defendant's Motions for Directed Verdict be GRANTED. Final Judgment will therefore be entered accordingly by separate order pursuant to this memorandum opinion.

DONE AND ORDERED in chambers at

Miami, Florida this 19 day of September 1983.

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

(Footnotes contained
on separate pages)

CC: Dr. Mark Feldman,
pro se
All Counsel of Record

FOOTNOTES

1. Plaintiff later attempted to allege additional claims after filing his amended complaint. The Court however declined to exercise pendent jurisdiction over these claims and they are not subject to this order.

2. Prior to the commencement of trial the Court ordered the Plaintiff to limit his evidence to the liability issue only. Defendants were then expected to proceed with their case on liability. Thereafter, a determination would be made whether to permit the jury to consider the liability phase first or to proceed directly to the issue of damages. Obviously in the light of the Court's decision to grant a directed verdict for all defendants, it was unnecessary to formally bifurcate the trial of this cause.

3. The Court announced its decision and orally directed a verdict at the conclusion of plaintiff's case-in-chief. At that time a final appealable order was promised which would fully incorporate the rationale upon which the Court based its decision. See Announcement of Decision (Docket No. 853). This memorandum opinion and accompanying final judgment fulfills that promise.

4. The five pubilc hospitals are owned by three public entities. Jackson Memorial Hospital ("Jackson") is owned by the Board of Trustees of the Public Health Trust of Dade County, Florida. The South Broward Hospital District, a special tax district in Broward County, Florida, owns and operates Memorial Hospital of Hollywood, ("Memorial"). The North Broward Hospital District, a similar tax district, owns and operates Broward General Medical Center, ("Broward General"),

North Broward Hospital ("North Broward"), and Imperial Point Hospital ("Imperial Point").

The private hospitals are Cedars of Lebanon Hospital ("Cedars"), Mt. Sinai Medical Center ("Mt. Sinai"), Florida Medical Center Hospital ("Florida Medical Center"), Bennett Community Hospital ("Bennett"), Holy Cross Hospital ("Holy Cross"), North Beach Medical Center ("North Beach"), Pembroke Pines General Hospital ("Pembroke Pines"), Doctors General Hospital (" Doctors"), International Hospital ("International"), North Miami General Hospital (" North Miami"), Cypress Community Hospital ("Cypress"), and North Ridge General Hospital ("North Ridge").

5. The administrators were named in the caption of the Amended Complaint but no claims were ever pursued against them. Dr. Feldman eventually agreed that the administrators should be dropped from the action and they were. See Order of Clarification issued April 21, 1983 (Docket No. 662.

6. Podiatrists are licensed in Florida to treat ailments of the human foot and leg below the knee, not including amputations. They may also prescribe medication which relates specifically to the scope of their authorized practice. Fla. Stat. Ann. S 461.003 (3) (1981).

7. Indeed, while the evidence as a whole failed to create a jury question, as to some defendants there was no evidence offered at any point during the trial.

8. In fact, the Court has accorded Dr. Feldman considerable latitude throughout the course of this litigation, particularly in ensuring that he was able to conduct

discovery. The Court has been mindful from the very inception of this litigation that this Plaintiff is representing himself in a very complicated and exhaustive litigation. See Feldman, supra at 818

9. The Court concedes that an apparent ambuiguity existed on this point. The Court in Feldman, supra at 820, suggested that the required nexus was between the defendants' challenged activity and interstate commerce but went on to apply the more liberal test relating to the defendants general activities and inteestate commerce. The Court applied the latter standard in sustaining Plaintiff's complaint against the jurisdictional attack made by the defendants.

10. The Court is aware that recent cases appear to reject this liberal jurisdictional atandard at least in the context of hospital staff privilege claims and have adoptes the more stringent jurisdictional test of making the Plaintiff establish a nexus between the defendants' challenged activity and interstate commerce. See e. g. Cardio Medical Associates v. Crozer-Chester Medical Center, 536 F. Supp. 1065, 1075-76 (E. D. Pa. 1982); Pontius v. Children's Hospital, 552 F. Supp. 1352, 1365 (W. D. Pa. 1982). These cases reject the argument that McLain has broadened Sherman Act jurisdiction by relating the "nexus" requirement not to the challenged conduct, but to the defendants' activities in general.

The Court believes that the Supreme Court said what it meant in McLain and that it meant to apply a more liberal jurisdictional standard in testing the sufficiency of plaintiff's jurisdictional allegations. Cf. Construction Aggregate Transport v. Florida Rock Industries, supra at 767, n.31. Accordingly, in the absence of some controlling authority to the contrary, this Court will apply the jurisdictional test enunciated in Feldman. It is the law of this case.

11. Although a podiatrist's license is broader, Dr. Feldman voluntarily restricted his surgical practice to the foot and ankle because of his training and experience.

12. The University of Miami Medical School faculty was on staff at Jackson Memorial Hospital pursuant to a contract between Jackson and the University. Most full time faculty members (and all of the orthopedic caculty) participated in a "personal income plan" under which they received a fixed salary which was not dependent upon revenues they generated. Drs. Sarmiento, NewtonMcCullough and Wallace Miller were in this group. Therefore, the orthopedic surgeons at Jackson--alleged to be the cradle and hub of the conspiracy--had no economic motive to deny or limit Dr. Feldman's privileges.

Jackson also gave clinical faculty appointments to private physicians who taught residents on a part-time basis. These clinical faculty members did not admit their private patients toJackson and were not paid for their work there. The result is that orthopedic surgeons in private practice were helping to educate new orthopedic surgeons who would then go out into the market as competitors. This evidence is certainly inconsistent with the Plaintiff's theory that the orthopedic surgeons were worried about competition from podiatrists or Dr. Feldman.

13. If this case were to be submitted to the jury, an instruction directing the jury to apply the rule of reason would be necessary. "Under this rule the fact finder weighs all of the circunstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T. V. v GTE Sylvania, 433 U. S. 36, 49, 97 S. Ct. 2549, 2557 (1978)(emphasis supplied.)

> To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was

> imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, all are relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences.

Board of Trade of City of Chicago v. United States, 246 U. S. 231, 238, 38 S. Ct. 242, 244 (1917). See also, National Society of Professional Engineers v. United States, 435 U. S. 679, 692, 98S. Ct. 1355, 1365 (1978). "The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition." Id. 435 U. S. at 695-95, 98 S. Ct. at 1367.Accordingly, Dr. Feldman's contnetion that the per se standard should apply because this was a group boycott was rejected.

14. Proof of conspirational behavior requires a showing of some agreement or concerted activity to achieve an unlawful goal. Borrowing a phrase from the law of contracts, this agreement involves a "meeting of the minds" by the defendants.

An apt analogy was provided by counsel G. Bruce Hill during argument on the motions for directed verdicts:

> Now, to use an anology, if you and I go to the annual meeting, stockholder meeting of General Motors and they ask for a show of hands as to whether we want a dividend

or not, you might be sitting at the front of the room and raise your hand and I might be sitting in the back of the room and raise my hand. We both agreed, at least to our selves, that we wanted a dividend. We might even want it for the same reasons. But, we didn't have a meeting of the minds over that. And I think that's an analogy in these hospitals. They did the same thing, a lot of them. Sometimes they did it for the same reason.

But there's been absolutely no showing of a meeting of the minds. (R. 4458-59)

15. In his Amended Complaint, Dr. Feldman defined the relevant product as surgical services. Since Hospitals cannot perform surgery (they sell health care facilities), there could not be a viable monopoly claim in this action by the hospitals. They and Dr. Feldman were not competitors, nor could they be.

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-Civ-JWK

Mark H. Feldman, Pro Se,

Plaintiff

vs.

JACKSON MEMORIAL HOSPITAL, et. al.,

Defendants.

FINAL JUDGEMENT ON DIRECTED VERDICT

This action came before this Court for trial before a jury, and this Court, at the conclusion of Plaintiff's case, having directed a verdict in favor of all Defendants in accordance with Rule 50(a), Fed. R. Civ. P., it is thereupon

ORDERED AND ADJUDGED that Plaintiff MARK H. FELDMAN take nothing by way of this action and that Defendants Bennett Community Hospital (Humana Hospital Bennett), Broward General Hospital (North Broward Hospital District), Cedars of Lebanon Hospital, Cypress Community Hospital, Florida Medical Center, Holy Cross Hospital, Imperial Point Hospital, (North

Broward Hospital District), International Hospital (Miami International Hospital), Jackson Memorial Hospital (Public Health Trust of Dade County), Memorial Hospital of Hollywood (South Broward Hospital Dsitrict), Mt. Sinai Medical Center, North Beach Medical Center, North Broward Hospital (North Broward Hospital District), North Miami GeneralHospital, North Ridge General Hospital, Pembroke Pines General Hospital, Pembroke Pines General Hospital, Paul S. Baxt, M. D., Neil Beinhaker, M. D., Harry E. Beller, M. D. , Robert Berger, M. D., Rufus Broadaway, M. D., Robert A. Bronfman, M. D., Willwiam Cleveland, M. D. , Alan B. Cohen, M. D., Sidney Cole, M. D. ,George Crane, M. D., W. Cullipher, M. D., Melvin Drucker, M. D., Harry Fisher, M. D., Harold Glick, M. D., Harvey Grable, M. D., Ledford Gregory, M. D., Michael S. Gurvey, M. D., Marshall Hall, M. D., Claude D. Holmes, M. D., Eugene Komrad, M. D. ,Gary Krulik, M. D., Niles R. Lestrange, M. D., Sheldon Marne D. P. M., Newton McCullough, M. D., Bronson J. McNierney, M. D.,

Martin G. Mendelssohn, M. D., Wallace Miller, M. D., Lloyd Moriber, M. D., Robert I. Nines, M. D., Arthur J. Pearl, M. D., Alfonson F. Petti, M. D., George T. Rahilly, M. D., Salvador Ramirez, M. D., Edward Rockwood, M. D., Larry D. Rosenbaum, M. D., Lester A. Russin, M. D., Thomas Samartino, M. D., Augusto Sarmiento, M. D., Peter Sciaretta, M. D., Wylie Scott, M. D., Alvin Stein, M. D., Frank Stein, M. D., Mario Stone, M. D., Frank A. Stuart, M. D. William A. Terheyden, M. D., Alvin Tobis, M. D., Samuel Turek, M. D., Charles Weiss, M. D., and Robert Zeppa, M. D., go hence without day and recover their costs from Plaintiff MARK H. FELDMAN, which shall be taxed by the Clerk of this Court upon timely submission of Defendants' Bill of Costs.

DONE AND ORDERED in chambers of Miami, Florida, this 19 day of September, 1983.

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

cc:Mark H.Feldman, pro se
All Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

MARK H. FELDMAN, Pro Se,
Plaintiff,

CASE NO. 79-758
CIV-JWK

v.

JACKSON MEMORIAL HOSPITAL, et al.,
Defendants

ORDER ON MOTION TO VACATE JUDGMENT

This matter is before the Court on a post-judgment motion filed by th- pro se plaintiff, Mark H. Feldman. He has moved the Court to vacate the final judgment previously entered in this cause and to re-enter an identical final judgment that would enable the plaintiff to timely perfect his appeal. Plaintiff bases his motion on Fed. R. Civ. P. 60 (b).

Because plaintiff's fundamental appeal rights were at stake, the Court scheduled an expedited hearing on the motion and directed the defendants to submit an immediate written responce. At the emergency hearing, plaintiff was accorded the opportunity to

establish that he was entitled to the extraordinary relief that he sought.

After considering this matter carefully, the Court is not persuaded thst plaintiff has established any mitigating or special circumstances or special hardships justifying the extraordinary relief of vacating a judgment now final and unappealable. To the contrary, plaintiff has given the Court absolutely no basis to grant him an entirely new appeal.

FACTS

1. The Court has lived with this massive litigation over the last four years. During this period of time two memorandum opinions were issued and published. Feldman v. Jackson Memorial Hospital, 509 F. Supp. 814 (S.D. Fla. 1981) ("Feldman 1"); and Feldman v. Jackson Memorial Hospital, 571 F. Supp. 1000 (S. D. Fla. 1983) ("Feldman 11"). No other case in this division has received more extensive judicial attention over such a prolonged period.

2. This case was tried before a jury last summer on plaintiff's antitrust claims. The trial itself was protracted and lasted for five weeks. The issues were complex, some of them quite novel. See Feldman 11, supra. At the conclusion of the trial, the Court resolved the pertinent issues adversely to the plaintiff and orally announced its decision to direct a verdict against the plaintiff. The Court later issued its final appealable order on September 19, 1983. See Final Judgment on Directed Verdict (Docket No. 857).

3. The Final Judgment on Directed Verdict was accompanied by a Memorandum Decision and order Granting Motions for Directed Verdict. Both orders were issued at the same time and copies of the two orders were sent to each party in a single envelope. These copies were placed in the mail on September 19, 1983. At least one defense counsel acknowledged receiving his copies of the two orders on September 21, 1983.

4. According to the docket maintained by the Clerk, the Final Judgment was entered on the docket September 20, 1983. This act by Clerk announced the time for appeal.

5. Initially, plaintiff denied receiving the Final Judgment on Directed Verdict. Plaintiff did however confirm that he received a copy of Court's Memorandum Decicision some time during the appeal period. He stated that he anticipated receiving the Final Judgment separately as indicated in the Memorandum Decision.[1]

6. Just prior to the hearing, plaintiff notified the Court and defense counsel that he had discovered his copy of the Final Judgment in his papers. At the hearing plaintiff conceded with commendable candor that he had in fact received that Final Judgment with the copy of the Memorandum Decision. Plaintiff testified that he had overlooked the Final Judgment and was unaware that he had it in his possession.

7. The appeal period has expired and no notice

of appeal has been filed. The Court calculates that seventy-five days have now elapsed since the Final Judgment was entered on the docket of the Clerk.

DISCUSSION

1. The only issue for determination is whether , under these facts, the plaintiff has presented mitigating circumstances or special hardships justifying relief from the operation of this judgment. The Court can find no mitigating circumstance that would justify the extraordinary relief that plaintiff seeks.

2. In order to revive his appellate rights, plaintiffs' only recourse is to persuade the Court that the Judgment should be vacated and entered anew. Any possible extension of the appeal period pursuant to Fed. R. App. P. 4 (a) (5) has already expired and this Court has no power to grant a sufficient extension of time to be of any use in this instance. Plaintiff therefore places sole reliance upon Fed. R. Civ. P. 60 (b) which

provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect;...or (6) any other reason justifying relief from the operation of the judgment....

3. Fed R. Civ. P. 77 (d) makes it clear that lack of notification of the appealable order itself has no effect on the time for appeal. Fed. R. Civ. P. 77 advisory committee note. It is in this context that plaintiff's motion to vacate must be viewed.

4. This circuit has provided a limited exception to the strict enforcement of Rule 77 and gives the District Court some direction in applying Rule 60 (b) to ameliorate the harsh consequences of a rule so final in its application. If plaintiff can show some mitigating circumstance or special hardship, he may be entitled to relief under Rule 60 (b), to ameliorate the harsh consequences of a rule so final in its application. If

plaintiff can show some mitigating circumstance or special hardship, he may be entitled to relief notwithstanding Rule 77(d). See Fidelity & Deposit Company of Maryland v. USAFORM Hail Pool, 523 F. 2d 744 (5th Cir. 1975).

5. While the Fidelity case has formulated the proper rule of law to be applied to plaintiff's motion, it is clearly distinguishable on its facts. The case is particularly useful in showing what is a special hardship justifying relief from judgment and what is not. Plaintiff here has not established that his plight is a special hardship exempting him from the normal time limits governing appeals.

6.In the Fidelity case counsel made diligent inquires to ascertain the status of his case. When he called the court he was told that his repeated inquires were unnecesaary and that he would be informed of the entry of judgment in his case by the clerk. In

reliance upon this statement, counsel made no further inquiry. Counsel was not however informed that the judgment was entered and did not learn of it until 103 days after it was entered. Upon application, the district court vacated its judgment and re-entered it to allow for a timely appeal.

In affirming the district court's actions, the appellate court ruled that these facts oresented a special hardship warranting relief from judgment. Two facts were noted. First, appellant's counsel did make suitable inquiry into the status of his case and he was assured that he would be notified by the clerk of the entry of his judgment. Secondly, that there was no prejudice to either side since on one had been informed of the judgment.

7. Plaintiff's situation presents no such special hardship. He has conceded that he had actual notice of the final appealable order. The fact that he may have overlooked or misplaced document cannot justify relief from the judgment. His neglect to timely perfect his

appeal is not excusable. Is is precisely the kind of neglect that cannot be excused if the benefit of finality of judgments is to have any purpose or meaning in our legal system. The court concludes that plaintiff has failed his burden under Rule 60(b) to establish a special hardship or some mitigating circumstance to relieve him from this judgment.

8. There is the further consideration of how a reopened judgment will effect these defendants. The court has not overlooked the prejudice that these defendants will suffer by vacating this judgment. The defendants have endured over four years of litigation and a five week trial. This action terminated with a directed verdict at the close of plaintiff's case. The court specifically found that plaintiff had not adduced sufficient evidence to even allow a jury to consider his issues. When the appeal period expired the defendants should reasonably have expected ~~that this~~ massive/

itigation was finally at an end and that hey could resume their normal lives free rom the worry of further legal action.The efendants would be severly prejudiced by aving this cause reopened and experiencing he further uncertainty of an appeal.

. Finally, plaintiff's pro se status cannot e invoked to justify special consideration n this issue. [2] Plaintiff has represented imself quite capablyduring the course of his litigation. He became conversnat in ivil procedure, the rules of evidence and he substantive law having to do with the everal complex antitrust issues which he resented during trial. His diligent study nd work gave him skills, knowledge, and ractical understanding far beyond that ossessed by most pro se litigants. His erformance in court demonstrated a remark- ble knowledge of the law, considering that e was entirely self-taught. In short, laintiff is as capable as any lay person nd possibly as capable as many lawyers are

in protecting his rights.

10. In a related context, the Fifth Circuit has ruled that a litigant may not invoke his pro se status as a defensive shield to insulate him from the result of his own neglect and to obtain a ruling that his neglect is excusable. In Pellegrino v. Marathon Bank, 640 F. 2d 696, 698 (5th Cir. Unit B 1981) the appellate court helt that it was an abuse of discretion to find excusable neglect under the circumstances presented by that case.

> (W)here a pro se appellant has rebuffed representation, has undertaken his own legal cause fully aware of possible consequences, and has demonstrated facility in procedural matters, we hold that the district court abused its discretion in permitting Pellegrino to invoke pro se status as a defensive shield from insulating him from the result of his own neglect, which we hold clearly inexcusable. Id. at 696-697

Accordingly, plaintiff is entitles to no special consideration due to the fact that he has chosen to represent himself and has become solely responsible for the progress of his case.

CONCLUSION

The Court concludes that plaintiff has abandoned his appeal rights through his own neglect. This Court has no discretion to relieve plaintiff from the operation of the Final Judgment issued on Septment 19, 1983.

It is therefore

ORDERED AND ADJUDGED that plaintiff's motion to vacate and re-enter final judgment is DENIED.

DONE AND ORDERED in chambers at Miami, Florida , this 5th day of December, 1983.

(Footnotes contained on a separate page.)

JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Mark H. Feldman, Pro Se, All Defense Counsel of Record

CASE NO. 79-758-CIV-JWK

FOOTNOTES

1. The Court observes that receipt of the Memorandum Decision itself ahould have placed the plaintiff on notice that a final appealable order had in fact been issued. See Feldman 11, 571 F. Supp. 1000, 1004 n.3. ("This memorandum decision and accompanying final judgment fulfills that promise"). (emphasis supplied). In light of the Court's finding of the final judgment, the court need not determine what effect plaintiff's receipt po the Memorandum Decision alone would have had on his appeal rights.

2. Plaintiff has never attempted to use his pro se status to persuade the Court to rule in his favor. However, where the law mandates that parties proceeding on their own behalf are to be held to a somewhat less stringent strandard then those who retain counsel, the plaintiff's status should be addressed, particularly where his own neglect has resulted in the loss of his appeal.

APPENDIX E 1e

IN THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

83-5805
No. 84-5089

FELDMAN, MARK H. (Dr.) D. P. M., M. S.
Plaintiff-Appellant

versus

JACKSON MEMORIAL HOSPITAL, INC., ET AL.,

Defendants-Apellees.

ON SUGGESTION FOR HEARING EN BANC

(December 17, 1984)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

No Judge in regular active service on the Court having requested that the Court be polled on hearing en banc (Rule 35 Federal Rules of Appelate Procedure; Local Eleventh Rule 26), Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

MOT-6H (Rev. 5/82)

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 83-5805
84-5089
Non-Argument Calender

MARK H. FELDMAN (Dr.) D. P. M., M. S.

Plaintiff-Appellant,

census

JACKSON MEMORIAL HOSPITAL, INC., ET AL.,

Defendants-Apellees.

Appeals from the United States District Court for the Southern District of Florida

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(January 11, 1985)

Before TJOFLAT, HILL and ANDERSON, Circuit Judgees.

PER CURIAM:

Appellant Feldman is a pro se plaintiff in an antitrust suit under S 1 and 2 of the Sherman Act. After a five week trial, the District Court directed verdicts in favor of all defendants on every legal theory alleged by Feldman. Thereafter, Feldman was sent the district Court's final order and judgment. However, Feldman failed to read the judgment when it arrived at his house and thereafter he misplaced it among his legal papers. Upon realizing that final judgment had been entered, Feldman filed a motion to vacate the judgment under Fed.R.Civ.P. 60 (b((1) (" mistake, inadvertence, surprise, or excusable neglect") and 60 (b) (6) (" any other reason justifying relief from operation of the judgment"). Since his Rule 60 (b) motion was filed well past the 30-day period during shich he should have filed a notice of appeal, see Fed. R.App.P. 4(a), Feldman sought to vacate the judgment, and have the district Court reenter judgment, so as to provide him with a new time period for filing his notice of appeal.

The district Court denied Feldman's Rule 60 (6) motion. Under Fed.R.Civ.P. 77(d), the district Court may not "relieve a party for failure to appeal within the time allowed" unless the party seeking relief can show mitigating circumstances or special hardship. Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., 523 F.2d 744, 748-51 (5th Cir.1975),[1] cert. denied, 425 U. S. 950

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[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

(1976). Feldman's failure to read the district Court's judgment and his subsequent misplacing of the judgment does not amount to a mitigating circumstance or special hardship. Certainly, the district Court did not abuse its discretion in so finding. Jester v. United States, 714 F. 2d 97, 99 n. 2 (11th Cir. 1983) (standard of review under Rule 60(b) is whether or not district Court abused its decretion).[2]

In Its directed verdict order, the district Court taxed costs against Feldman in favor of the defendants. Feldman does not challenge the propriety of awarding costs to the defendants, but rather claims that the award was excessive. However, an appeal will not lie from an award of costs when the court acted within its power in awarding such costs. United States v. Mitchell, 580 F. 2d 789,794 (5th Cir. 1978). Thus, Feldman's claim in this regard is without merit.

AFFIRMED.

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The fact that Feldman is proceeding pro se does not excuse him from filing a timely notice of appeal. See Pellegrino v. Marathon Bank, 640 F. 2d. 696 (5th Cir. Unit B Mar. 25, 1981)